

## § 776.22a

now be subject to the Act if he is employed in an enterprise engaged in covered construction as defined in the amendments.

[35 FR 5543, Apr. 3, 1970]

### ENTERPRISE COVERAGE

#### § 776.22a Extension of coverage to employment in certain enterprises.

Whether or not individually covered on the traditional basis, an employee is covered on an "enterprise" basis by the Act as amended in 1961 and 1966 if he is "employed in an enterprise engaged in commerce or in the production of goods for commerce" as defined in section 3 (r), (s), of the Act. "Enterprise" is defined generally by section 3(r) to mean "the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units." If an "enterprise" as thus defined is an "enterprise engaged in commerce or in the production of goods for commerce" as defined and described in section 3(s) of the Act as amended, any employee employed in such enterprise is subject to the provisions of the Act to the same extent as if he were individually engaged "in commerce or in the production of goods for commerce", unless specifically exempt, section 3(s), insofar as pertinent to the construction industry, reads as follows:

Enterprise engaged in commerce or in the production of goods for commerce means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which:

\* \* \* \* \*

(3) Is engaged in the business of construction or reconstruction, or both.

Questions of "enterprise coverage" in the construction industry which are not answered in published statements of the Department of Labor may be addressed to the Administrator of the Wage and Hour Division, Department

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of Labor, Washington, DC 20210, or assistance may be requested from any of the Regional or District Offices of the Division.

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### INDIVIDUAL EMPLOYEE COVERAGE IN THE CONSTRUCTION INDUSTRY

#### § 776.22b Guiding principles.

(a) *Scope of bulletin and general coverage statement.* This subpart contains the opinions of the Administrator of the Wage and Hour Division with respect to the applicability of the Fair Labor Standards Act to employees engaged in the building and construction industry. The provisions of the Act expressly make its application dependent on the character of an employee's activities, that is, on whether he is engaged "in commerce" or in the "production of goods for commerce including any closely related process or occupation directly essential to such production." Under either of the two prescribed areas of covered work, coverage cannot be determined by a rigid or technical formula. The United States Supreme Court has said of both phases that coverage must be given "a liberal construction" determined "by practical considerations, not by technical conceptions."<sup>1</sup> The Court has specifically rejected the technical "new construction" concept, as a reliable test for determining coverage under this Act.<sup>2</sup>

So far as construction work specifically is concerned, the courts have cast the relevant tests for determining the scope of "in commerce" coverage in substantially similar language as they have used in construing the "production" phase of coverage. Thus the Act applies to construction work which is so intimately related to the functioning of interstate commerce as to be, in practical effect, a part of it, as well as to construction work which has a close and immediate tie with the process of production.<sup>3</sup>

<sup>1</sup>*Mitchell v. Vollmer & Co.*, 349 U.S. 427; *Kirschbaum Co. v. Walling*, 316 U.S. 517; *Alstate Construction Co. v. Durkin*, 345 U.S. 13.

<sup>2</sup>*Mitchell v. Vollmer & Co.*, ante.

<sup>3</sup>*Mitchell v. Vollmer & Co.*, ante; Cf. *Armour & Co. v. Wantock*, 323 U.S. 126.